EDITOR'S NOTE

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89-7645

NO. 89-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

DIONISIO HERNANDEZ,

Petitioner,

v.

PEOPLE OF THE STATE OF NEW YORK

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE NEW YORK STATE COURT OF APPEALS

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QUESTION PRESENTED FOR REVIEW

Whether the exclusion of Latino jurors from a petit jury through the use of peremptory challenges because of their ability to understand in Spanish proposed Spanish language testimony violates the Equal Protection Clause of the Fourteenth Amendment?

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OPINIONS BELOW

The opinion of the New York State Court of Appeals is not yet reported; the slip opinion is attached in the Appendix at A1. The opinion of the New York State Appellate Division is reported at 140 A.D.2d 543, 528 N.Y.S.2d 625 (2d Dept. 1986) and is attached in the Appendix at A23. The opinion of the New York State Supreme Court is not reported, and the transcript of the oral decision is attached in the Appendix at A25.

JURISDICTION

The decision of the New York State of Appeals was rendered on February 22, 1990. The jurisdiction of the this Court is invoked pursuant to 28 U.S.C. §1257(a) and Rule 13.1 of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourteenth Amendment of the Constitution of the United States which provides in pertinent part:

> ..[N]or shall any State deprive any person of life liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Dionisio Hernandez was charged in a New York State criminal proceeding with attempted murder, assault and criminal possession of a weapon. The charges arose out of incident in which it was alleged that petitioner attempted to kill his girlfriend, soon-to-be wife, and her mother. Two patrons of a restaurant were also wounded in the incident.

Jury selection took place on November 3 - 7, 1986. There was no transcript maintained of the voir dire examination. On November 6, 1986, after the examination of sixty-three jurors had been completed and nine jurors had been selected, defense counsel objected to the prosecution excluding all potential Latino jurors through the exercise of peremptory challenges. A26. In explaining his reasons for the exercise of four of his peremptory challenges, the prosecutor stated as to two of the Latino jurors:

> We talked to them for a long time: the Court talked to them, I talked to them. I believe that in their heart they will try to follow [the interpreter's translation], but I felt there was a great deal of uncertainty as to whether they could accept the interpreter as final arbiter of what was said by each of the witnesses, especially where there were going to be Spanish-speaking witnesses, and I didn't feel, when I asked them whether or not they could accept the interpreter's translation

> of it, I didn't feel that they could. They each looked away from me and said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter, and I feel that in a case where the interpreter will be for the main witnesses, they would have undue influence.

A27. The prosecutor explained that the other two Latinos had family members that had been or would be prosecuted by his office. The trial judge made no specific finding that the proffered explanations were neutral but denied the defendant's motion. A38. The empaneled jury included no Latinos.

Following a trial, the judge dismissed the assault charges involving the two men in the restaurant. The jury returned a guilty verdict on all counts submitted on the charges of attempted murder and criminal possession of a weapon.

On appeal, the New York State Appellate Division held that the defendant had made out a prima facie case of discrimination, but that the prosecutor had stated nondiscriminatory reasons for his challenges. A24. It affirmed the conviction.

The New York State Court of Appeals also affirmed by a divided court. The majority opinion, joined by four judges, found that there was a prima facie case of discrimination. However, it found, under Batson v. Kentucky, 476 U.S. 79 (1986), that the prosecutor had stated a nondiscriminatory reason for the challenges to the Latino jurors. It held that: "Hesitancy or uncertainty about being able to decide the case on the same evidence which binds every member of a jury is a proper, neutral and nondiscriminatory basis for the prosecutorial exercise of peremptory challenges." A9.

One judge, in a concurring opinion, invited the New York State legislature to consider eliminating or limiting the use of peremptory challenges.

Two judges in dissent urged a reversal of the conviction. They found that an explanation by a prosecutor that has a disparate impact on members of the defendant's racial or ethnic group is inherently suspect. They found, further, that there was insufficient basis in the record to support a finding that the prosecutor's explanation for the challenges was a neutral one. Both jurors had satisfied the trial court that they would accept the official court translation. Therefore, contrary to assertion of the majority opinion, the case was not really about whether the jurors would "decide the case on the official evidence before them." Moreover, there was no evidence that the prosecutor had sought to determine whether non-Latino jurors also spoke Spanish. The dissent stated that in this case requires heightened scrutiny and that the trial court should have made further inquiries of the prosecutor to support the peremptory challenges.

> Where, as here, a language-based reason for exercising peremptory challenges is intimately linked to ethnicity and has the same impact as one that is, in fact, ethnically based, the People's offer of a neutral explanation must be subject to enhanced scrutiny....Otherwise, absent that somewhat more demanding standard, the prosecution's removal of all persons of a certain ethnic group, whether intentionally or not, can all too readily by justified by the mere recitation of a language-based reason. In this State, with its varied and often concentrated ethnic populations, the inevitable effect on the composition of juries of permitting such language-based justifications without close inspection would be intolerable.

A20

REASONS FOR GRANTING CERTIORARI

NEW YORK'S HIGHEST COURT HAS RULED THAT PEREMPTORY CHALLENGES MAY BE USED TO EXCLUDE LATINOS FROM ALL JURIES IN WHICH THERE IS TO BE SPANISH LANGUAGE TESTIMONY, IN CONTRAVENTION OF THE FOURTEENTH AMENDMENT AND INCONSISTENT WITH THE DECISIONS OF THE OTHER STATE AND FEDERAL COURTS

This Court in Batson v. Kentucky, 476 U.S. 79 (1986) applied the Equal Protection Clause of the Fourteenth Amendment to the use of peremptory challenges in criminal cases. It found that a pattern of challenges excluding jurors of the race or ethnicity of the defendant may create an inference of discrimination by the prosecutor. In which case, a prosecutor "must articulate a neutral explanation [for challenging the jurors] related to the particular case to be tried." Id. 476 U.S. at 98 (footnote omitted). The Court recognized that race-based explanations were not "neutral" as a matter of law: "the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption - or his intuitive judgment - that they would be partial to the defendant because of their shared race." Id. at 97 (citations omitted). Here, as a matter of law, the prosecutor proffered a reason that was neither "neutral" nor an "explanation."

The reason provided by the prosecutor for challenging two Latino jurors was tied to their Spanish language ability and thus to an integral part of their ethnicity. See, Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926); Olagues v. Russionello, 797 F.2d 1511, 1520-21 (9th Cir. 1986), vacated as moot, 484 U.S. 806

(1987); and see e.g. 42 U.S.C. §1973aa-1a (providing voting rights protection to "language minorities"); 29 CFR 1606.6 (prohibiting ethnic origin discrimination in employment based on language).[1] Language cannot serve as a neutral basis anymore than an explanation based on race or color. See, United States v. Wilson, 884 F.2d 1121 (8th Cir. 1989)(en banc). The prosecutor stated that his reason for excluding the jurors was that he did not believe that the two jurors "would be able to listen and follow the interpreter." A26. Both jurors, in response to questions from the court and prosecutor, stated that they would accept the official translation of the interpreter. A31. The prosecutor stated that he did not believe them. A27. Every Spanish speaking juror could be removed through peremptory challenges for the same reason.

The prosecutor claimed that his belief that the jurors were unable or unwilling to follow the interpreter was based on their hesitancy in responding to questions about the translations from Spanish. A27. But the hesitancy evidenced in these two jurors does not distinguish them in any way. A similar hesitancy would be found in all other Spanish speaking jurors. Questions about following an interpreter's translation invariably lead to hesitant responses. Inquiries about the ability to follow an interpreter require a juror to mentally go through a perplexing analysis while

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[1] In Brooklyn (Kings County, New York) where the trial in this matter took place approximately 96% of all Latinos 5 years old and older spoke Spanish in the home. See, 1980 Census Population: General Social and Economic Characteristics, Vol. 34 (N.Y.) at tables 51 and 172.

the prosecutor is waiting for a response. In essence, a juror is asked, "If the witness says in Spanish 'negro' and the interpreter translates that to be 'white,' can you disregard what you heard with your own ears in the court?" Everyone would have some hesitancy in understanding and responding to questions of that type. Indeed, not one, but both jurors that were challenged here evidenced that same hesitancy. Even where there is no "black/white" discrepancy between the testimony and the translation, Spanish fluent jurors will hear and understand the Spanish testimony before it is translated. Their understanding of the testimony is necessarily going to be influenced by what they heard in Spanish. Any hesitancy by prospective jurors in saying that they will disregard what they heard in Spanish is only natural and part and parcel of Spanish speaking ability.[2] The prosecutor's reference to the jurors' hesitancy expressed in words like "I will try" or by body language[3] does not make the his explanation for the peremptory challanges a neutral one, but confirms that it is based on Spanish language ability.

As a matter of law, the prosecutor's explanation would not

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[2] This Court has recognized that certain questions necessarily and appropriately lead to hesitant responses. Adams v. Texas, 448 U.S. 38, 49-51 (1980); see similarly, People v. Turner, 42 Cal.3d 711, 230 Cal.Rptr. 656, 726 P.2d 102 (1986).

[3] The prosecutor claimed that these jurors avoided eye contact with him. A27. However, Latinos often out of respect avert their eyes. See, Final Report of the New Jersey Supreme Court Task Force on Interpreter Translation Services, Equal Access to the Courts for Linguistic Minorities, (May 22, 1985) at 33.

have been considered race neutral explanation if he stated that he challenged the Latino jurors because they spoke Spanish. Spanish language fluency is integrally related to ethnicity.[4] Reference to the fact these same jurors were somewhat hesitant in answering questions about the official interpretation does not neutralize the prosecutor's explanation. That hesitancy is integrally related to Spanish language ability and thus ethnicity. One necessarily follows the other. The prosecutor's explanation, as a matter of law, was race-based and not neutral.[5]

In other cases in which a prosecutor has stated that race was a factor in his judgment about exercising a peremptory challenge, the courts have found a per se violation of the Equal Protection Clause. In United States v. Wilson, supra, the prosecutor testified that a black juror who was peremptorily challenged lived

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[4] The majority opinion below accepted this a fortiori connection between a language and ethnicity, but failed to decide the case on that basis. A6-7. But see, State v. Pemberthy, 224 N.J.Super. 280, 540 A.2d 227 (N.J. Super. A.D.), appeal denied, 111 N.J. 633, 546 A.2d 547 (1988), where a New Jersey appellate court accepts a prosecutor's peremptory challenges of Latino and non-Latino jurors based on Spanish language ability where a major issue in the case was the accuracy of translations of out-of-court statements by the defendants. Both parties were offering expert testimony on the translation.

[5] If the prosecutor's true concern was that the jurors would hear and translate the Spanish language testimony differently than the translator, there is clearly a less discriminatory alternative to removing all Latino jurors. See, Albemarle Paper Company v. Moody, 422 U.S. 405, 425 (1975). The judge could instruct jurors that if they did not agree with a translation, they could pass a note to the court to seek a clarification. See, United States v. Perez, 658 F.2d 654, 662-663 (9th Cir. 1981); Santana v. New York City Transit Authority, 132 Misc.2d 777, 505 N.Y.S.2d 775 (Sup. Ct. N.Y. Co. 1986).

in the same town as the defendant, who was also black. He argued that the juror would be influenced by the defendant or contacted by his friends. He said that a white juror from the same town would be less likely to be influenced or contacted because of race. He testified that race is "like being a member of a lodge." Id. 884 F.2d at 1124. The Eighth Circuit found that the explanation was not race neutral. The same result was reached in decisions by the highest courts in Indiana, Florida and California. In all three cases, prosecutors peremptorily challenged black jurors because of their concern that black jurors would respond negatively to prosecution witnesses who had made racially offensive remarks. The courts found that these race-based reasons failed to satisfy the requirement of neutrality. Minniefield v. State, 539 N.E.2d 464 (Ind. Sup. Ct. 1989): State v. Slappy, 552 So.2d 18 (Fla. Sup. Ct.), cert. denied, __ U.S.__, 101 :/Ed/2d 909 (1988); People v. Johnson, 22 Cal.3d 296, 148 Cal.Reptr. 915, 583 P.2d 774 (1978). The decision of the New York Court of Appeals is inconsistent with these decisions. An explanation that includes race and ethnicity cannot be neutral as a matter of law.

It is incumbent on this Court to respond to these post--Batson inconsistent interpretations of the requirements of the Fourteenth Amendment. Petitioner is not asking the Court to make a fact-based determination about discrimination. Rather, petitioner seeks a decision by this Court that directs all courts to reject, as a matter of law, explanations by prosecutors which are based in part on race and ethnicity. Prosecutors should not be allowed to avoid

the limitations of the Equal Protection Clause by relying on integral parts of race and ethnicity, such as language and culture. The dissent below correctly foresees that decisions like this one will inevitably lead to the exclusion of all language minorities from trials in which there will be non-English testimony.

Furthermore, there is even more reason for concern here than in the cases cited above. For here, the explanation provided by the prosecutor was in fact no explanation at all. Peremptory challenges are used by the prosecutor to eliminate jurors who may be biased in favor of the defendant or against the prosecution. The prosecutor seeks a jury free of such bias. As this Court recognized in Batson, "a prosecutor ordinarily is entitled to exercise permitted peremptory challenges 'for any reason at all, as long as that reason is related to his view concerning the outcome' of the case to be tried, United States v. Robinson, 421 F. Supp. 467, 473 (D. Conn. 1976), mandamus granted sub nom. United States v. Newman, 549 F.2d 240 (CA2 1977)..." Batson, 476 U.S. at 89 [emphasis added]. Similarly, the Second Circuit stated in a case leading to the Batson decision, that "[t]here are any number of bases on which a party may believe, not unreasonably, that a prospective juror may have some slight bias that would not support a challenge for cause but that would make excusing him or her desirable." McCray v. Abrams, 750 F.2d 1113, 1132 (2d Cir. 1984), cert. denied, 478 U.S. 1001 (1986) (cited in Batson, 476 U.S. at 98 n.20). See, similarly, Swain v. Alabama, 380 U.S. 202, 220-221 (1965). What is singular and significant about the explanation

here is the absence of any indication of the prosecutor's view of how the challenges relate to the "outcome of the case" or more simply, what bias, however slight, do these jurors have. In Wilson, Minniefield, Slappy, and Johnson, at least the prosecutors' reliance on race was tied to potential juror bias. Here, the explanation is void of any of claims of bias. The prosecutor did not offer a speculative or intuitive judgment that these jurors fell into a non-racial or non-ethnic class of persons that would be anti-prosecution or pro-defendant.[6]

Thus, this is not even a case where hunches, even those based on the tone of voice, body language or signs of indifference, might support a belief about the potential for bias by the juror. There is nothing in the ability to speak Spanish, other than ethnic origin, that indicates a bias or prejudice by the juror. All jurors who speak and understand Spanish are subject to peremptory challenges because they can understand the Spanish language testimony better than the other jurors who only hear the English translation; not because the translation may be inaccurate, but because there is fuller understanding of what is said when it is

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[6] The explanations for the other two Latino jurors that were peremptorily challenged were distinctly different. In both, the prosecutor pointed to specific facts that might demonstrate an anti-prosecutor bias. "...Mr. Munoz, his brother is being prosecuted by our office. His brother had a violation of probation. I don't think we went into any detail on the underlying crime, but I thought that as I questioned him on that, there might be some prejudice." A30. "I believe that I even questioned - challenged her [Ms. Rivera] for cause, but I do know that her brother was arrested for gun possession, he's doing five years probation at this time." A31.

heard in Spanish.[7] However, Latino jurors cannot be stricken because other jurors might be influenced by them. The whole purpose of Batson is to allow a defendant the opportunity to be tried by persons of his own race and ethnicity. Here, where there was an allegation of a crime of passion between a man and his wife-to-be, a prosecutor cannot challenge Latino jurors because of his concern that their cultural comprehension of concepts of "machismo" may influence the other jurors. Neither should he be allowed to challenge Latino jurors whose understanding of Spanish may influence other jurors. Culture and language are integral parts of Latino ethnicity, and a prosecutor's explanations based on culture or language cannot be considered race neutral. Peremptory challenges based on language and culture presume that Latino jurors

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[7] As the New York State Supreme Court stated in Santana:

> In any trial where an interpreter's services are required, the party/witness, at the outset, is placed at a disadvantage. Much of the impact and demeanor of the party/witness becomes obscured by the presence of an interpreter. The jury's attention tends to become transfixed on the interpreter, an unexpressive participant in the trial.
>
> English is a very expansive and expressive language and an interpreter may at times have to make a choice between two or more words which are similar in definition. An interpreter tries not to put words in the most emphatic way unless absolutely required. Inevitably, due to the spontaneity of the interpreter's translation of a word, it is possible that the interpreter may not choose the best word possible, thus causing a deviation in the intended communication to the jury. However, the use of specific word can have a significant impact on what is being communicated.

Id. 505 N.Y.S.2d at 779. Santana involved a tort action in which a Spanish word could be interpreted either as a crash or a bump.

will favor Latino defendants. This is an impermissible assumption under Batson.

Batson holds that the explanation of the prosecutor must be "related to the case to be tried." Id. at 98. The prosecutor here offered no explanation that the challenged jurors might be prejudiced toward the prosecution. California and Florida accepted challenges to the use of race-based peremptories under their state constitution's prior to Batson. After Batson they continued to require that the prosecutor's explanation include information about the individual or specific bias, however slight, of challenged the juror. Slappy (relying on the earlier decision in State v. Neil, 457 So.2d 481 (Fla. Sup. Ct. 1984)); People v. Turner, 42 Cal.3d 718, 230 Cal.Rptr. 651, 726 P.2d 102 (1986) (relying on the earlier decision in People v. Wheeler, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978)); and see similarly, State v. Gilmore, 103 N.J. 508, 511 A.2d 1150, 1166 (1986); Commonwealth v. Soares, 387 N.E.2d 499, 514 (Mass. Sup. Ct.), cert. denied, 444 U.S. 881 (1979). The seminal decision in Wheeler directed the lower courts to require prosecutors to explain their challenges in terms of the "specific bias on the part of the individual juror." Id. at 22 Cal.3d at 284, fn. 32. The review of proffered explanations in all these states revolves around whether the juror actually exhibits the "specific bias" articulated by the prosecutor and whether other jurors who were not challenged exhibit the same specific bias. For example, where a prosecutor in a drug case explains that he seeks to exclude young persons from the jury, because he believes

the young have more sympathy for defendants in drug cases and that older jurors are better in such cases, a trial court will consider if an excluded Latino juror was young and whether other young jurors who were not Latino were also excluded. See, e.g. People v. Trevino, 39 Cal.3d 667, 217 Cal.Rptr. 652, 704 P.2d 719 (1985). The acceptance of even a neutral explanation that has no relationship to the case to be tried makes Batson a meaningless precedent.

New York's lack of inquiry stands in stark contrast to the practice in California and Florida. The unquestioned acceptance of the prosecution's explanation by the New York courts opens up an enormous hole in the Fourteenth Amendment. The trial court made no attempt to probe the prosecutor's explanation for the peremptory challenges. If this case had arisen in California, the prosecutor would have had to state the "specific bias" of the challenged jurors.[8] It would then have been evident that the prosecutor was concerned about having Latino jurors judge a Latino defendant in a case involving a crime of passion. Not only did the trial judge not probe the prosecutor, he made no specific findings about the neutrality of the prosecutor's explanation and whether non-Latinos were also questioned about their language ability. Nevertheless, the New York appellate courts affirmed the denial of the Batson

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[8] The Supreme Courts of at least two states, Nevada and California, have found that hesitation while facially neutral does not constitute a specific bias related to the case. Trevino, 39 Cal.3d at 692 & n.25; Clem v. State, 760 P.2d 103, 105 n.2 (Nev. Sup. Ct. 1988).

motion as if it were based on such findings.[9]

This Court has once sought to address the standards of scrutiny to be applied when neutral explanations had been offered without any apparent connection to a specific bias of the challenged jurors. Tompkins v. Texas, 490 U.S. __, 104 L.Ed.2d 834 (1989). This case presents a further opportunity to establish such standards, not only where the explanations have no apparent connection with a specific bias of a juror, but an explanation that is language-based and, thus, integrally tied to ethnicity. New York's practice is inconsistent with states like Florida and California.

Latino jurors can now be excluded from all juries where there is a possibility of a witness testifying in Spanish on the pretext that the prosecution does not believe that the jurors will be able to follow the interpreter's translation. If these language-based non-explanations "were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement.'" Batson, 476 U.S. at 98, quoting Norris v. Alabama, 294 U.S. 587, 579 (1935).

[9] The majority opinion below compounds this error. It quotes from the trial court's reiteration of the prosecutor's explanation and treats it as if it were a finding of fact by the court. Compare A4 with A35 and A38.

CONCLUSION

The decision by the New York State Court of Appeals threatens the rights of all Latino defendants to equal protection of the law. The rights provided by the Batson decision are effectively denied to Latino defendants and jurors anytime there is a possibility that the trial may include testimony in Spanish. This decision in New York must be brought in line with other decisions by the circuit courts and the highest state courts which have found violations of Equal Protection Clause whenever prosecutors directly rely on race and ethnicity as part of their explanations for peremptory challenges. Furthermore, this Court must address the diverse opinions on the appropriate standards to apply in evaluating explanations that point to no apparent case-outcome bias exhibited by the challenged jurors. This case presents an appropriate opportunity to spell out the contours of the Batson decision.

Wherefore, petitioner respectfully requests that this Court grant his petition for writ of certiorari.

DATED: May 23, 1990

Respectfully submitted,

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APPENDIX

State of New York
Court of Appeals

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2 No. 10
The People &c.,
Respondent,
v.
Dionisio Hernandez,
Appellant.

OPINION

Robert M. Pitler, Daniel E. Rosenfeld, Brooklyn, for appellant.

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BELLACOSA, J.:

Defendant's essential argument attacks the judgment of conviction as having been secured in violation of his equal protection rights because, as he asserts, the prosecution discriminatorily exercised its peremptory challenges to exclude two Latino persons from the jury that ultimately found him guilty of two counts each of attempted murder and criminal possession of a weapon (see, Batson v Kentucky, 476 US 79). Defendant, also a

Latino, satisfied the Batson (476 US 79, supra) threshold predicate of discriminatory use of peremptory challenges by the prosecutor's rejection of all the Latino prospective jurors.

The dispositive issue -- circumscribed in this case by pertinent undisturbed factual findings -- is whether the prosecution can be said to have failed to satisfy its burden, in turn, to come forward with a neutral explanation for its eschewal of those prospective jurors so as to refute the inference of purposeful discrimination. The two prospective jurors at issue, who were fluent in Spanish, indicated, according to the prosecutor's articulated belief, that they would only try to respect as authoritative the official court interpreter's translation of evidence given by Spanish-speaking witnesses. This prosecutorial assertion, sufficiently documented by the record and supported in the findings of the two lower courts, warrants our concluding that the prosecutor fulfilled his burden of coming forward with a satisfactory explanation that the peremptory strikes in this case were neutral and nondiscriminatory. We thus affirm the order of the Appellate Division which had affirmed the conviction.

The conviction, after a jury trial, arose out of a shooting in which defendant had attempted to kill his young woman friend and her mother as they left a restaurant in Brooklyn. During the incident, random shots from defendant's gun struck and wounded two other patrons of the restaurant.

Prior to trial and after the voir dire examination of sixty-three jurors had been completed and nine jurors had been

selected, defense counsel objected to the prosecutor's use of peremptory challenges excusing four potential jurors with Latino surnames. Over the course of an extensive record colloquy, defense counsel objected repeatedly that the prosecutor had removed every Latino from the venire and moved for a mistrial.

The Assistant District Attorney responded that he had challenged two of the jurors, Munoz and Rivera, because each had a brother who had been prosecuted by the same District Attorney's office and that in his opinion these jurors could not be fair in their deliberations on the case. The prosecutor further explained that he had challenged the other two jurors, Mikus and Gonzalez -- the only jurors pertinent to the disposition of the issue before us -- because each had given him a basis to believe from words and actions that their Spanish language fluency might create difficulties in their accepting the official court interpreter's translation of the testimony of the Spanish-speaking witnesses. Among selected expressions made during the colloquy, the prosecutor proffered this summary for the record:

> Assistant District Attorney: Your Honor, my reason for rejecting the -- these two jurors -- I'm not certain as to whether they're Hispanics. I didn't notice how many Hispanics. I didn't notice how many Hispanics had been called to the panel, but my reason for rejecting these two is I feel very uncertain that they would be able to listen and follow the interpreter * * * * We talked to them for a long time; the court talked to them; I talked to them. I believe that in their heart they will try to follow it, but I felt there was a great deal of uncertainty as to whether they could accept the interpreter as the final arbiter of what

> was said by each of the witnesses, especially where there were going to be Spanish-speaking witnesses, and I didn't feel, when I asked them whether or not they could accept the interpreter's translation of it, I didn't feel that they could. They each looked away from me and said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter, and I feel that in a case where the interpreter will be for the main witnesses, they would have an undue impact on the jury (Apdx, at 23-24 [emphasis added]; see also, Apdx, at 26-28, 29).

The Trial Court then denied defendant's mistrial motion, stating:

> The Court: Therefore, he [Assistant District Attorney] didn't make a challenge for cause based upon that, but he said the reason that he did in fact remove these jurors is because even though they said they could listen to what the interpreter said and not let their own evaluation of what the witness says be the answer that they would utilize, he said I have grave doubts, and that's why I'm asking. (Apdx, at 32 [emphasis added]).

The case was tried with no Latinos on the jury and defendant was convicted. The Appellate Division affirmed the judgment of conviction and a Judge of this Court granted leave to appeal.

New York's Criminal Procedure Law provides a method for both the prosecution and defense counsel to challenge for cause the selection of a potential juror if it can be shown that bias may prevent that juror from deciding the case impartially (CPL 270.20). Additionally, a limited number of peremptory challenges -- because counsel may intuit a bias that is not documentarily demonstrable sufficient for a challenge for cause -- are allowed to exclude jurors usually without any explanation (CPL 270.25).

The 1986 rule in Batson v Kentucky (476 US 79, supra) added restrictions to the exercise by prosecutors of their peremptory challenges against members of a defendant's racial class. It abandoned the prosecutorially-weighted evidentiary tilt of Swain v Alabama (380 US 202) and imposed a new and important calculus. To succeed initially in erecting the presumption of purposeful discrimination, the defendant must demonstrate (1) membership in a "cognizable racial group"; (2) the exercise of peremptory challenges by the prosecutor to exclude members of the defendant's group; and (3) "facts and any other relevant circumstances rais[ing] an inference" of a discriminatory purpose (Batson v Kentucky, supra, at 96).

At that point the burden shifts to the prosecution to come forward and overcome the attribution and inference of purposeful discrimination with an articulable neutral explanation for having excused those jurors. The prosecutor's explanation need not rise to the level for sustaining a challenge for cause. On the other hand, the prosecutor cannot simply state that rejecting the jurors rested on the assumption they might be favorably disposed to the defendant because of shared race or ethnic similarities. While the prosecutor has this burden of coming forward, "the ultimate burden of persuasion" must be carried by the person alleging the intentional discrimination (Batson v Kentucky, supra, at 94, n 18). By these respective weights, Batson calibrates the test and burdens while supplying a potent and appropriate remedy against invidious petit jury discrimination.

In People v Scott (70 NY2d 420), we applied the Batson rule retroactively under Griffith v Kentucky (479 US 314). Defendant, a black woman, was charged with murdering and robbing a white man. There were five black prospective jurors in the venire and the prosecutor excused them all peremptorily. We held that the prosecutor's "'pattern' of strikes" gave rise to an inference of discrimination satisfying defendant's lighter burden (People v Scott, supra, at 425-426). We reversed without having to address in that case the issue of what constitutes a neutral explanation under Batson.

Here, no one challenges the triggering of Batson's threshold. The exercise of prosecutorial peremptory challenges to exclude the only Latino jurors in the prosecution of a Latino defendant is enough (Batson v Kentucky, 476 US 79, supra, at 96-97; People v Scott, 70 NY2d 420, supra). The only new issue, circumscribed here by pertinent undisturbed factual findings, is whether the prosecution responded with a satisfactory nondiscriminatory explanation for excluding the only Latino jurors. Defendant contends as a matter of law that the burden has not been met because the Latino origins and the Spanish language are so inextricably intertwined that an exclusion of Latinos on the basis of language is inescapably, almost irrefutably, an exclusion on forbidden ethnic or racial grounds.

These jurors, however, were challenged because they indicated their knowledge of the Spanish language might interfere with their sworn responsibility as jurors to accept the official translation of the Spanish-proffered testimony. So it cannot be,

as defendant has posed it and as the dissenting opinion would conclude, that the isolated language-ethnic identity factor alone determines this case.

Rather, the prosecutor's belief was that the two Spanish-speaking jurors might be unable or unwilling to accept the evidence properly submitted to them by the court. That is a legitimate neutral ground for exercising a peremptory challenge, and it was for the Trial Court to determine if the prosecutor's explanation was pretextual or real and justified by the answers and conduct of the two jurors during voir dire. Indeed, the Supreme Court itself recognized that resolution of these issues springing from the Batson test were rightly reposed in fact-finding courts entitled to "great deference" with customary appellate oversight (Batson v Kentucky, 476 US 79, supra, at 97-98). That reasonable minds could disagree at this level of review on this record demonstrates the wisdom and propriety of the Supreme Court's and our view that, in the distribution of judicial functions among courts, deference generally to the fact-finding and evidence-viewing court is warranted in these circumstances. The Trial Court accepted the prosecutor's explanation, as did the Appellate Division, and we have no basis in law or policy to conclude that those courts erred in these essentially factual determinations.

Indeed, the prosecution documented its belief on the jurors' statements and on doubt-raising body language descriptions (e.g., averted eyes and gazes on being questioned on the critical points) developed during an extensive voir dire and

placed on the record before the Trial Justice, who was also present at the entire voir dire. The record-based beliefs, advanced to satisfy its Batson-based burden, do not appear to us as a matter of law and did not appear to the lower courts as a matter of fact to be some facial facade. If the court was not satisfied with the adequacy of this explanation after watching and listening to the proceedings, of course it could have conducted a further voir dire; but under the circumstances presented here, that was a matter within the Trial Court's discretion.

The burden, moreover, does not require the prosecution, as the dissenting opinion would, to come forward with reasons rising, in effect and function, to a sustainable challenge for cause, for that would extend Batson and Scott, not apply them. Justice Powell's Opinion for the Supreme Court in Batson is the primary source of guidance and development, and it is carefully modulated to require that the prosecution must show only a neutral record-based belief for exercising a now properly circumscribed statutory right of peremptory excusal of jurors. To bear a proper and balanced burden of coming forward with a neutral explanation of a peremptory excusal of a juror is one thing; to create a new, higher burden of disproving, under "enhanced scrutiny" and the "inherently suspect" classification, a subjective, even "unconscious," state of mind is quite something else. This would be practically and legally speaking an impossible and ultimate burden of proof, not the lesser burden of coming forward with a justifiable explanation. Indeed, this

rule would not just circumscribe the exercise of a peremptory challenge by the People; it would change its very nature because the People would have to prove cause for removal as to the juror and absolute purity as to themselves.

In sum, we view quite straightforwardly the essence of this case as being really about a prosecutor's court-accepted explanation concerning the ability of these jurors -- or any sworn jurors no matter their race or ethnic similarities -- to decide a case on the official evidence before them, not on their own personal expertise or language proficiency (compare, People v Legister, ___ NY2d ___ [slip opn, 2-8-90]). Hesitancy or uncertainty about being able to decide the case on the same evidence which binds every member of a jury is a proper, neutral and nondiscriminatory basis for the prosecutorial exercise of peremptory challenges. The findings here of a legitimately articulated reason rooted in principles of jury selection, responsibility and function are valid and supportable in this record.

It is important to emphasize, however, that pretextual maneuvering or less verifiable manifestations of jurors' attitudes about adhering to governing instructions will not satisfy the prosecution's burden. Thus, our holding in no way diminishes the apodictic policy and precedents at issue, which we unequivocally reaffirm.

Our analysis of the record and issues of this case on the merits would produce the same result under the Federal and State equal protection right, as no justification for breaking

new ground as to this clause by differentiating between this dually-protected constitutional right is sufficiently advanced (see, Under 21 v City of New York, 65 NY2d 344, 360; Matter of Esler v Walters, 56 NY2d 306, 313-314).

Defendant's remaining contentions of evidentiary trial errors involving impeachment, bolstering and cross examination are unavailing, because in the circumstances of this case these matters were within the range of the Trial Court's discretion.

There being no equal protection violation or any other error warranting disturbing the actions of the courts below, the order of the Appellate Division should be affirmed.

People v Dioniso Hernandez
Case No. 10

Titone, J. (concurring):

I am in complete agreement with and wholeheartedly join in the majority opinion by Judge Bellacosa. In addition, the posture in which the Batson question is presented here prompts me to set forth my own, strongly held beliefs on the subject of post-Batson peremptory challenges.

In his concurrence in Batson (476 US, at 102-108), Justice Marshall made the observation that the potential for racial discrimination is inherent in the very notion of a system of juror challenges that need not be explained. He further noted that a prosecutor's seemingly neutral verbiage explaining his use of peremptories can easily mask an underlying racist animus, whether conscious or unconscious, adding another layer of complexity to the trial court's task of assessing the propriety of the proffered explanation.

Justice Marshall's comments highlight for me the very profound difficulties involved in administering a juror challenge system that is theoretically based on the attorney's inexplicable personal hunch with a constitutional rule that requires attorneys

to offer satisfactory "neutral" explanations for their choices. The mandated inquiry, as it is conceived in both the majority and the dissenting opinions, entails an analysis that looks beyond the prosecutor's stated explanation in certain instances, and considers the prosecutor's subjective motivations and state of mind. The inquiry thus renders what was originally to be a matter of unexplained choice into an exploration that is in some respects more complex, and certainly more intrusive, than the objective inquiry involved in resolving juror challenges for cause. Moreover, because, as the dissenter notes, racist motives are easily concealed, there is no assurance that even an in-depth inquiry will be effective in eradicating racial bias in the jury selection process.

The Supreme Court's decision in Batson was a welcome, necessary and important judicial statement that racial bias and racist motivations have no place in our American courtrooms. In the final analysis, however, the most significant development to come out of Batson may well lie in Justice Marshall's observation that "only by banning peremptories entirely can such discrimination be eliminated" (476 US, at 107-108). Even Batson, as Justice Marshall noted, permits a degree of discrimination by establishing a threshold test for a prima facie case that tolerates some number of unexplained ethnically targeted challenges (476 US, at 105 ["prosecutors are left free to discriminate * * * provided that they hold that discrimination to an "acceptable level"]. Manifestly, an institution that furnishes the opportunity for racial discrimination, at any

level, is -- and will continue to be -- highly problematic in a society that has grown increasingly intolerant of judgments made on the basis of stereotyping in any form.

At this point in the evolution of this legal issue, I suspect that rather than developing a complex set of judicially imposed limitations and standards, the most constructive course would be for the Legislature to take a hard look at the existing peremptory system with a view toward determining whether it is still viable, at least as it is presently constituted.* Whether or not Justice Marshall was correct in his assumption that the historic institution of peremptory challenges simply cannot be purged of its potential for discriminatory practices, it has become increasingly clear that judicial efforts to accomplish that goal can lead only to new layers of inquiry and complex tests that are fundamentally incompatible with the institution's basic premise (see, People v McCray, 57 NY2d 542, 545-549). While such efforts can and must continue to be made, it seems to me that the time is fast approaching for the Legislature to rethink its policy choices in this highly sensitive area of law.

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*It may well be that a system with a drastically reduced number of peremptories for each side would adequately serve the essential purpose of permitting some unexplained juror challenges (see, People v McCray, 57 NY2d 542, 547-549), while at the same time minimizing the opportunity for and incentives to engage in purposeful discrimination.

People v Hernandez
No. 10

KAYE, J. (dissenting):

The special importance of this appeal is that it calls upon us, for the first time, to spell out the People's burden once a defendant has established a prima facie case of discrimination in the exercise of peremptory challenges. The United States Supreme Court has not yet been required to do that; nor has our only other opinion on point--People v Scott (70 NY2d 420). By this case we thus set a course for the future in this State, marking out the tolerable limits for the People's exercise of peremptory challenges.

The course we now set, I believe, diminishes the declared principle that peremptory challenges cannot be used to discriminate against racial or ethnic groups. As Justice Marshall cautioned in Batson, "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror." (476 US at 106.) If that is all that is required, the majority's decision proves

his point that there is indeed little real protection in defendant's newly-recognized equal protection right. I therefore respectfully dissent.

Preliminarily, this case should be decided as a matter of state law, rather than federal law (majority opn, p 11).

Issues involving the proper exercise of peremptory challenges are especially suited to resolution as a matter of state law at this time. As Justice White made clear in his Batson concurrence, "[m]uch litigation will be required to spell out the contours of the Court's equal protection holding today, and the significant effect it will have on the conduct of criminal trials cannot be gainsaid." (476 US at 102.) In a matter of such day-to-day vital importance locally, the citizens of this State would be well served by the development of an authoritative body of state law instead of being held in suspense, case-by-case, over the next decade of litigation while the United States Supreme Court fleshes out the newly-recognized minimum equal protection right that will prevail across the nation. Several other state courts do exactly this. Indeed, the independent development of state law concerning peremptory challenges has proved particularly beneficial nationally as well as locally. It was, after all, state courts independently construing their state constitutions that ultimately led the Supreme Court in Batson to abandon Swain v Alabama (380 US 202) and follow "the lead of number of state courts construing their state's constitution." (See, Batson v Kentucky, supra, at 82 n 1.)

Moreover, it cannot be assumed that state law would proceed in lockstep with federal law as the federal law on this issue emerges. While this Court in People v McCray (57 NY2d 542, cert denied 461 US 961) declined to read the state equal protection right differently from then-existing federal law, Batson has effected a very significant change in federal law that might well alter that conclusion. Just such a shift occurred only recently with respect to the exclusionary rule (see, People v P.J. Video, 68 NY2d 296, cert denied 479 US 1091; see also, People v Johnson, 66 NY2d 398, 411 [Titone, J., concurring]).

Thus, I would decide this case as a matter of state law, agreeing with the observation of the New Jersey Supreme Court that the fact "[t]hat the United States Supreme Court has overruled Swain in Batson does not mean that the laboratories operated by leading state courts should now close up shop." (State v Gilmore, 103 NJ 508, 522, 511 A2d 1150, 1157.)

Reaching the merits, if our review of the prosecutor's conduct is to become merely a matter of identifying undisturbed findings of fact with some support in the record, or deferring to the trial court and Appellate Division or to the prosecutor's assertion of some ostensibly neutral ground, then the role of this Court in defining and protecting defendants' nascent constitutional right has been virtually surrendered at the outset. While the trial judge's observations of the unfolding events are of course important, there is still a significant role for this Court in clearly articulating the standard and then

determining the law question whether the People have satisfied that standard. That has not been done.

This case differs from other "Batson" cases in a critical respect that is not sufficiently credited by the majority. Here, the prosecutor's "neutral" explanation is one that necessarily produces disparate impact on a single ethnic group. The statistics before us indicate that, in Kings County, virtually all Latinos speak Spanish at home. That this case additionally involves testimony of witnesses in Spanish and an official translator hardly minimizes the potential for disparate impact: we are advised that the state court system employs 113 Spanish translators--presumably rendering accurate translations in court proceedings--who are engaged more than 250 times a day. Accepting as a sufficient explanation that the prosecution will offer the testimony of a witness whose native tongue is Spanish--whether or not an interpreter is required--too easily circumvents the People's obligation and the defendant's right, and allows the prosecutor to do by indirection what can no longer be done directly.

An explanation by a prosecutor that may appear facially neutral but nonetheless has a disparate impact on members of defendant's racial or ethnic group is "inherently suspect." (Serr & Maney, Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of A Delicate Balance, 79 J Crim L & Criminology 1, 54 [1988].) Consequently, a reason that is grounded largely in speculation rather than facts uncovered in a voir dire examination, as revealed by the record, should not be

accepted (see, State v Sleppy, 522 So2d 18 [Fla]; Gamble v State, 257 Ga 325, 357 SE2d 792; State v Gilmore, supra; see also, 2 LaFave & Israel, Criminal Procedure § 21.3 [1989 Pocket Part]). To conclude otherwise can too easily permit discriminatory practices to continue. "[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal. A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective [latino] juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. * * * [P]rosecutor's peremptories are based on their 'seat-of-the-pants instincts.' Yet 'seat-of-the-pants instincts' may often be just another term for racial prejudice." (Batson, 476 US at 106 [Marshall, J., concurring].)

Here, there is not a sufficient evidentiary record to support the prosecutor's explanation. Two persons believed to be of "Spanish descent" were excluded because their Spanish language fluency "might interfere with their sworn responsibility as jurors to accept the official translation of the Spanish-proffered testimony." (Majority opn, at 7.) The majority skews the issue when it states that this case is really about these jurors' ability "to decide the case on the official evidence before them, not on their own personal expertise or language proficiency" (majority opn, p 10); if that were so they undoubtedly would have been excused for cause. Despite this

Court's repeated reference to the two jurors' initial expressed uncertainty or hesitancy, the fact remains that both individuals satisfied the court that they would accept the official court translation, and that they would be fair and impartial jurors. As the trial judge stated on the record, the two jurors "said they could listen to what the interpreter said and not let their own evaluation of what the witness says be the answer that they would utilize." Similarly, the prosecutor acknowledged that the jurors' "final answer was they could do it" [i.e., accept the official court translation as final].

While the People emphasize their interest in excluding Spanish-speaking jurors because of the presence of an interpreter, there is no indication that any other members of the panel were also asked if they spoke Spanish. Charged by defense counsel with discriminating against the two, it is significant that in offering his explanation to the trial court the prosecutor made no indication of similar interest about the balance of the panel (cf., State v Antwine, 743 SW2d 51 [Mo], cert denied ____US____, 108 S Ct 1755 [reasons given--inattentiveness during voir dire and relative in prison--were also reasons used to challenge whites]; State v Walton, 227 Neb 559, 418 NW2d 589 [reason given--no ties to community--also used to challenge whites]; see also, LaFave & Israel, op cit.).

Thus, given the potential for disparate impact and the meager record made by the People on the issue, I cannot agree

with the majority that the People have satisfied their burden of rebutting the prima facie case of discrimination in this case.

Where, as here, a language-based reason for exercising peremptory challenges is intimately linked to ethnicity and has the same impact as one that is, in fact, ethnically based, the People's offer of a neutral explanation must be subjected to enhanced scrutiny. The objective of such scrutiny is not to equate peremptories with challenges for cause but to determine whether the proffered ground is indeed an appropriate reason to exclude such groups from the jury at all. Additional voir dire, either directed or conducted by the court, may not always be necessary, but some investigation or inquiry beyond the minimum mandated in the ordinary case is. Otherwise, absent that somewhat more demanding standard, the prosecution's removal of all persons of a certain ethnic group, whether intentionally or not, can all too readily be justified by the mere recitation of a language-based reason. In this State, with its varied and often concentrated ethnic populations, the inevitable effect on the composition of our juries of permitting such language-based justifications without close inspection would be intolerable.

In any event, certainly something more is required than the prosecutor's reference to a subjective impression (based on lack of eye contact) of the sincerity of the jurors' assurances that they would accept the interpreter's version of what the witnesses said. All that we know for certain in this case is that defendant is a Latino, and every Latino has been excluded from a panel of 93 individuals. That being so, the inference

remains unrebutted that the trial prosecutor struck the last two Latino jurors on the basis of an intuitive judgment deriving from their heritage. The Supreme Court in Batson concluded that the prosecutor "may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption--or his intuitive judgment--that they would be partial to the defendant because of their shared race." (476 US at 97-98.) On this record, we really have no more than that.

Finally, I must question the majority's facile assumption that the explanation offered by the prosecutor was a valid trial-related concern at all. If the interpreters employed by our criminal courts are as accurate as they should be, given that the defendant's liberty may depend upon the translator's words, then there should be no disagreement between the translator and jurors fluent in Spanish. Surely, the majority does not intend to suggest, on the other hand, that if the translator is rendering a witness' testimony inaccurately into English, the State has a valid interest in permitting the errors to go unnoticed. And if the prosecutor's concern is merely that the jurors may become involved in disputes about nuance and word choice, that could be adequately addressed by an instruction that Spanish-speaking jurors are to adhere to the official translation only, and bring any errors they may discern to the attention of the court, but under no circumstances to the attention of their fellow jurors. What is not a permissible method of addressing

the situation is the wholesale exclusion from the jury of anyone sharing defendant's racial or ethnic background.

On this record, the removal of the last two Latino jurors for what in the end is simply their proficiency in the Spanish language, should not be sanctioned. I would reverse the Appellate Division order and order a new trial.

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Order affirmed. Opinion by Judge Bellacosa in which Chief Judge Wachtler and Judges Simons and Titone concur, Judge Titone in a separate opinion. Judge Kaye dissents and votes to reverse in an opinion in which Judge Hancock concurs. Judge Alexander took no part.

Decided February 22, 1990

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saw the complainant, whom he knew, walking alone in the street late at night. It was further established by these witnesses that the defendant walked up to the complainant, pushed and punched him and hit him with a bottle. When the complainant ran away, the defendant shot him in the back from a distance of about 15 feet. Viewing the evidence in the light most favorable to the People (*see, People v. Contes*, 60 N.Y. 2d 620, 621, 467 N.Y.S.2d 349, 454 N.E.2d 932), we find that the trial testimony was legally sufficient for the jury to find the defendant guilty of the charges upon which he was convicted. The defendant also contends that these witnesses should not have been believed by the jury, since they were involved with illegal drugs. We disagree. The involvement of the witnesses with drugs was a factor to be weighed in gauging their credibility, and resolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury, which saw and heard the witnesses (*see, People v. Gaimari*, 176 N.Y. 84, 94, 68 N.E. 112). Its determination should be accorded great weight on appeal and should not be disturbed unless clearly unsupported by the record (*see, People v. Garafolo*, 44 A.D.2d 86, 88, 353 N.Y.S.2d 500). Upon the exercise of our factual review power, we are satisfied that the verdict was not against the weight of the evidence (CPL 470.15[5]).

We have reviewed the remaining arguments raised by the defendant and find them to be without merit (*see, People v. Goggins*, 34 N.Y.2d 163, 356 N.Y.S.2d 571, 313 N.E.2d 41, *cert. denied* 419 U.S. 1012, 95 S.Ct. 332, 42 L.Ed.2d 286; *People v. Thomas*, 46 N.Y.2d 100, 105, 412 N.Y.S.2d 845, 385 N.E.2d 584, *appeal dismissed* 444 U.S. 891, 100 S.Ct. 197, 62 L.Ed.2d 127; *People v. Ellis*, 126 A.D.2d 663, 511 N.Y. S.2d 90, *lv. granted* 69 N.Y.2d 949, 516 N.Y.S.2d 1032, 509 N.E.2d 367; *People v. Wise*, 46 N.Y.2d 321, 413 N.Y.S.2d 334, 385 N.E.2d 1262).

140 A.D.2d 543

The PEOPLE, etc., Respondent,

v.

Dionisio HERNANDEZ, Appellant.

Supreme Court, Appellate Division, Second Department.

May 16, 1988.

Defendant was convicted in the Supreme Court, Kings County, Beldock, J., of, inter alia, attempted murder, and he appealed. The Supreme Court, Appellate Division, held that prosecutor gave race neutral explanations sufficient to rebut Hispanic defendant's prima facie showing of discrimination in prosecutor's exercise of his peremptory jury strikes.

Affirmed.

1. Jury ⇐33(5.1)

Fact that prosecutor peremptorily challenged the only three prospective jurors who definitely had Hispanic surnames was sufficient to make out prima facie case of discrimination against Hispanic defendant accused of attempted murder.

2. Jury ⇐120

Prosecutor came forward with sufficient, race neutral explanations for his peremptory challenges of prospective jurors with Hispanic surnames where two jurors were dismissed because they had close relatives who had been prosecuted for crimes, and remaining two jurors spoke Spanish and indicated that they might have difficulty accepting court interpreter's translation of testimony as final and authoritative.

Martin Geoffrey Goldberg, Franklin Square, for appellant.

Elizabeth Holtzman, Dist. Atty., Brooklyn (Barbara D. Underwood, Nikki Kowalski and Carol Teague Schwartzkopf, of counsel), for respondent.

Before THOMPSON, J.P., and LAWRENCE, EIBER and BALLETTA, JJ.

MEMORANDUM BY THE COURT.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Beldock, J.), rendered January 30, 1987, convicting him of attempted murder in the second degree (two counts), criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

[1, 2] The defendant, who is Hispanic, claims that the prosecutor used his peremptory challenges to exclude from the jury all panel members with Hispanic surnames, thereby violating the defendant's equal protection rights (*see, Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69; *People v. Scott*, 70 N.Y.2d 420, 522 N.Y.S.2d 94, 516 N.E.2d 1208). Although the ethnicity of one challenged juror is not certain, the record reveals that the prosecutor did in fact peremptorily challenge the only three prospective jurors who definitely had Hispanic surnames. Therefore the defendant has made out a prima facie case of discrimination (*see, Batson v. Kentucky, supra*, 476 U.S. at 96, 106 S.Ct. at 1722; *People v. Scott, supra*, 70 N.Y.2d at 423, 522 N.Y.S.2d 94, 516 N.E.2d 1208). However, as to all the challenged jurors the prosecutor came forward with race neutral explanations for his challenges sufficient to rebut the defendant's prima facie showing (*see, Batson v. Kentucky, supra*, 476 U.S. at 96–97, 106 S.Ct. at 1722–23). Two of the jurors were dismissed because they had close relatives who had been prosecuted by the district attorney's office and there was a question as to their impartiality. The remaining two jurors, including the one whose Hispanic origin was questionable, were challenged because they both spoke Spanish and indicated during the voir dire that they might have difficulty accepting as final and authoritative the court interpreter's translation of the testimony. Although these explanations may not have risen to the level of those needed to justify a challenge for cause, they were sufficient to satisfy the prosecutor's burden to come forward with nondiscriminatory reasons for his challenges (*see, Batson v. Kentucky, supra*, at 97, 106 S.Ct. at 1723; *People v. Baysden*, 128 A.D.2d 795, 513 N.Y.S.2d 495; *lv. denied* 70 N.Y.2d 798, 522 N.Y.S.2d 115, 516 N.E.2d 1228; *People v. Cartagena*, 128 A.D.2d 797, 513 N.Y.S.2d 497; *lv. denied* 70 N.Y.2d 798, 522 N.Y.S.2d 116, 516 N.E.2d 1229).

140 A.D.2d 545

The PEOPLE, etc., Respondent,

v.

Wilfredo MAISONAVE, Appellant.

Supreme Court, Appellate Division, Second Department.

May 16, 1988.

Defendant was convicted of attempted murder, assault, possession of weapon and reckless endangerment by jury verdict before the Supreme Court, Queens County, Lakritz, J., and defendant appealed. The Supreme Court, Appellate Division, held that: (1) assault defendant was not entitled to second continuance to locate investigating police officer to lay foundation for police officer's report's admission, and (2) defendant had other means by which report could have been admitted.

Affirmed.

1. Criminal Law ⇐614(1)

Assault defendant was not entitled to second continuance during trial while police attempted to locate retired investigating officer, whose reports defendant wished to introduce as evidence of witnesses' prior inconsistent statements, where investigat-

THE CLERK: Let the record reflect that the nine prospective jurors have entered the courtroom and are sitting in the box.

(Whereupon, the selection of the jury continued).

(The following took place in chambers between counsel and the Court):

THE CLERK: First, we're considering jurors sitting in seats two, three and five for seats 10 and 12.

People have any challenges for cause? We're considering the first three seats where there's jurors still sitting. People for cause?

MR. McINTYRE: No.

THE CLERK: Defense?

MR. BLAUSTEIN: None by the defense.

Will the Court note the fact that I'm raising objection to counsel - - to the District Attorney taking Spanish people off the jury. This is already the fourth person of Spanish descent who had a Spanish name that the District Attorney has excluded from the jury, and I think even Elizabeth Holtzman, the District Attorney, several months ago said that she does not favor the practice of

her District Attorneys rejecting blacks or Hispanics or minority people, and she made it very plain. It was on page one of the Law Journal, and I'm going to make an objection here at this time.

MR. McINTYRE: Yes, your Honor, may I respond?

MR. BLAUSTEIN: I'm going to make an objection at this time that he has rejected all the Hispanics, Judge. We have no Hispanics on this jury because of the District Attorney's challenges, either peremptory or for cause.

I'm sorry. They were all peremptory. They weren't for cause. He had no real reason to reject any of them.

MR. McINTYRE: Your Honor, my reason for rejecting the - - these two jurors - - I'm not certain as to whether they're Hispanics. I didn't notice how many Hispanics had been called to the panel, but my reason for rejecting these two is I feel very uncertain that they would be able to listen and follow the interpreter.

MR. BLAUSTEIN: You mean the engineer couldn't understand?

MR. McINTYRE: Excuse me. I listened to you, Mr. Blaustein. Can you listen to me?

MR. BLAUSTEIN: Go ahead. I'm sorry.

MR. McINTYRE: We talked to them for a long time; the Court talked to them, I talked to them. I believe that in their heart they will try to follow it, but I felt there was a great deal of uncertainty as to whether they could accept the interpreter as the final arbiter of what was said by each of the witnesses, especially where there were going to be Spanish-speaking witnesses, and I didn't feel, when I asked them whether or not they could accept the interpreter's translation of it, I didn't feel that they could. They each looked away from me and said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter, and I feel that in a case where the interpreter will be for the main witnesses, they would have an undue impact upon the jury.

I see also, since Mr. Blaustein has raised the issue, that Mr. Luis Munoz - - if that's who he's referring to - - was challenged by the People. His brother had been arrested on a violation of probation, and I asked him several questions about that, not specific - - not several questions about

that, but I did ask him about that, and I didn't feel he could be fair to the People with his brother currently being prosecuted by law enforcement in our office.

I don't know of any other Hispanics.

MR. BLAUSTEIN: Do you still think the jury can be fair when we have mothers who have sons who are police officers? Do you think it's fair to put them on a jury?

You picked out the man quickly enough as Munoz as the other Spanish-speaking man.

MR. McINTYRE: Excuse me.

MR. BLAUSTEIN: You mentioned his name. I couldn't even remember his name, but I remember there was one other Spanish boy that you dumped, and I'm going to at this time ask for a mistrial, Judge, based on the fact - - based on the conduct of the District Attorney.

MR. McINTYRE: Your Honor, may I have a moment? I want to call my office.

THE COURT: About?

MR. McINTYRE: I would just like a moment to call my office.

MR. BLAUSTEIN: Can we have a ruling? I'm

moving for a mistrial.

MR. McINTYRE: I may want a supervisor over here.

MR. BLAUSTEIN: What is a supervisor going to do with this case?

MR. McINTYRE: Thank you.

THE COURT: Before I make a ruling.

(Pause in the proceedings).

MR. BLAUSTEIN: Let me renew my motion at this time.

THE COURT: Denied.

MR. McINTYRE: Let me respond also.

MR. BLAUSTEIN: I haven't had a chance to mention the names of the parties.

The District Attorney at this time is rejecting - -

THE COURT: Two jurors.

MR. BLAUSTEIN: (continuing) - - peremptorily Gonzalez, Mico (phonetically), and has rejected heretofore Munoz and Rivera, and I think that shows a pattern here of eliminating Hispanics from the jury, and I therefore move for a mistrial.

MR. McINTYRE: Your Honor, I have to respond just for the record. I do want to say, though,

before I respond on each of the individual jurors, that this case involves four complainants. Each of the complainants is Hispanic. All my witnesses, that is, civilian witnesses, are going to be Hispanic. I have absolutely no reason - - there's no reason for me to want to exclude Hispanics because all the parties involved are Hispanic, and I certainly would have no reason to do that. I'm just trying to find Mr. Rodriguez.

As I said about Mr. Munoz, his brother is being prosecuted by our office. His brother had a violation of probation. I don't think we went into any detail on the underlying crime, but I thought that as I questioned him on that, there might be some prejudice.

As I spoke to these last two, that is, her name is not Mico, I think it was Micous (phonetically) - -

MR. BLAUSTEIN: Micous. I'm sorry.

MR. McINTYRE: (continuing) - - his name is Gonzalez, and I questioned him at some length, and I felt that from their answers they would be hard pressed to accept what the interpreter said as the final thing on what the record would be, and I even

had to ask the Judge to question them on that, and their answers were - - I thought they both indicated that they would have trouble, although their final answer was they could do it. I just felt from the hesitancy in their answers and their lack of eye contact that they would not be able to do it.

I'm having trouble finding the notes on Rivera. Do you know what round he was in, Mr. Blaustein?

MR. BLAUSTEIN: It was a she.

THE COURT: She.

THE CLERK: She was sitting in the back row.

MR. BLAUSTEIN: It wasn't a he.

MR. McINTYRE: I believe I even questioned - - challenged her for cause, but I do know that her brother was arrested for gun possession, he's doing five years probation at this time.

In addition to that, she was the one who indicated that she would have a time problem if the case extended, and because of the length of the case and number of witnesses I had, I even questioned about whether or not she would feel the need to hurry up the case. I challenged her for cause, and the Judge denied my challenge for cause. You didn't consent to my challenge for cause.

My reason was I felt that time would be a factor in her decision, and I also felt that the fact that her brother was currently on probation might also influence her decision.

Those are my reasons for the jurors that you have mentioned.

MR. BLAUSTEIN: In other words, you're telling the Court now that if we had four blacks on trial here, that you would eliminate all the blacks from the jury just because you're telling me that because there are four Spanish people involved, that's why you're eliminating four Spanish people?

MR. McINTYRE: I don't understand your logic.

THE COURT: I don't follow you at all there.

MR. McINTYRE: I think that the reasons I've given you have nothing to do with their ethnicity.

MR. BLAUSTEIN: It must be because you said we had four Spanish people involved in this situation and therefore you don't want four Spanish people on the jury. Now if that isn't prejudicial, I don't know what it is.

THE COURT: That's not what he said, Mr. Blaustein. I don't know if you don't know what he says or you don't hear what he says.

What he said was why would he throw off Spanish people when all of his witnesses will be Hispanic people.

MR. BLAUSTEIN: Because he's afraid that there'll be sympathy by Hispanic jurors to Spanish defendants. That's as plain as the nose on my face.

THE COURT: Well, your nose is plain, I grant you that.

MR. McINTYRE: All the victims - - that has nothing to do with it.

THE COURT: The victims are all Hispanics, he said, and, therefore, they will be testifying for the People, so there could be sympathy for them as well as for the defendant, so he said ot would not seem logical in this case he would look to throw off Hispanics, because I don't think that his logic is wrong. They might feel sorry for a guy who's had a bullet hole through him, he's Hispanic, so they may relate to him more than they'll relate to the shooter.

MR. BLAUSTEIN: Well, Judge, let me ask you this question. The People have consistently refused to, in my challenges for cause, to reject

people who are relatives - - whose close relatives' sons and brothers are police officers. I mean, where's the logic there? I don't follow him. You mean that if you're Hispanic, you go off the jury, but if your son is a cop, you keep him on because it's very good to keep somebody on a jury whose son is a cop or whose brother is a cop or whose cousin is a cop?

MR. McINTYRE: May I say, Judge, just to respond once again, I don't want to be confused as saying I'm rejecting people who are Hispanic, but in every one of those cases where I didn't consent to your challenge for cause, Mr. Blaustein, those jurors said, when they were questioned by the Judge, that they could be fair.

Now, if you remember, there were a number of jurors who came up and spoke to the Judge, you and me, and who said they had friends who were police officers. It was a gentleman yesterday afternoon who said he had a friend who was a police officer, and he said he couldn't be fair. I consented. I consented to throw him off the jury.

Where a juror has said, however, that they have relatives or friends who are on the police

force and they can be fair, I don't think - -

MR. BLAUSTEIN: Well, number two and number three, who you wanted to reject today, both said in response to his Honor's questions they could be fair and they could render a fair and impartial verdict.

MR. McINTYRE: Accordingly, I don't feel a challenge for cause lies.

THE COURT: Therefore, he didn't make a challenge for cause based upon that, but he said the reason that he did in fact remove these jurors is because even though they said they could listen to what the interpreter said and not let their own evaluation of what the witness says be the answer that they would utilize, he says I have grave doubts, and that's why I'm asking - -

MR. BLAUSTEIN: Let me point out to the Court at this time that if we are to pick prospective jurors, that we're going to wind up eventually with these two women whose sons are both police officers. They are either going to wind up as jurors or alternates.

What position does that put me in? I only have one peremptory challenge, Judge, and I'm being

short-circuited here very quickly and very cutely by the District Attorney. He knows what he's doing. He's got two women sitting in the back, both got police officer sons. You're going to tell me they're not going to be influenced in any manner if a cop gets on the stand and testifies? You have to be very naive if you think they don't discuss matters with their sons and that they are going to be - - they're not going to bend backwards if they hear sons testifying. That's the only reason for - - I think one of the reasons for getting rid of these two jurors.

We're left here with a very small panel. I'm left with one peremptory. My throat is being cut because eventually there are going to be two women whose sons are cops. I have no choice. I won't be able to challenge them and dump them. What kind of fair trial is my client going to get?

MR. McINTYRE: So, Mr. Blaustein, you're in effect conceding that you have - -

MR. BLAUSTEIN: No. These are the reasons - -

MR. McINTYRE: Can I finish?

You're in fact then saying that there are reasons other than ethnicity for my challenging these

two jurors?

MR. BLAUSTEIN: I'm saying both ethnicity and the fact that you want to swing over to these other two women whose sons are cops.

MR. McINTYRE: As long as you're conceding - -

MR. BLAUSTEIN: We can't possibly get a fair trial if that condition is going to continue here unless we put in 10 new jurors in the box and start with 10 new and pick jurors from there, Judge, and reject the ones we had, which would be the only fair thing to do, because I'm going to get caught here with two women whose sons are cops, they're not going to do me any good anywhere.

THE COURT: Well, Mr. Blaustein, you say that, and I'm satisfied that these jurors could be fair and impartial from what they said.

As a matter of fact, one of these two prospective jurors said her son is now in the 77th, but he wasn't there before, so she recognizes that some policemen do things that are potentially - - and they're only accused, of course, of these crimes, so she recognizes that, and both of them said, when I questioned them, do you believe that police officers could do other than tell the truth, and they both

said yes.

In fact, they were smiling when I used the example of my son, who is now an attorney, who did not always tell the truth, and probably may even continue that way sometimes, and they both smiled when I said it because they recognized that, and I'm sure that their sons, during their lifetime, have lied to them, but the answer that their sons will not testify in this case nor will anybody from their precincts since neither one of them are in the precinct involved.

I don't understand the logic of that, because I understand people can be fair, and if they make up their mind to sit on a jury, they understand they must be fair. These ladies said they would be fair, and I questioned them about this situation, but we're not at those jurors yet, we're at the first two, and, therefore, based upon our discussion, I will deny the motion for the withdrawal of a juror based upon the fact that there was an - - action by the District Attorney to exclude all Puerto Rican jurors based upon only the question of ethnicity.

MR. BLAUSTEIN: Note my objection. Note my exception rather.